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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JABAR KENTA RANDLE, Defendant and Appellant.	C066313 (Super. Ct. No. 09F04530)

Defendant Jabar Kenta Randle was sentenced to 30 years in state prison after a jury convicted him of four counts of lewd and lascivious acts against a child under the age of 14 and one count of continuous sexual abuse against a child, all against his daughter (the victim). He appeals two of his five convictions for insufficient evidence, and claims his counsel provided ineffective assistance with regard to the lewd and lascivious act charge. He also claims the court relied on improper reasons to justify imposition of the upper term sentence. We will affirm the judgment.

FACTUAL BACKGROUND

Defendant had a 14-year relationship with the victim's mother, with whom he has two other biological children and one stepchild. Defendant lived with the victim's mother for approximately 13 of those 14 years. During a three-month period in 2005 they lived together with their four children at a particular apartment complex in Sacramento (the Sacramento Apartments). By 2007 their relationship was over and defendant no longer lived with the family.

In fall 2008 defendant's sister, together with her children and the then 13-year-old victim, watched a movie on the Lifetime channel about child molestation. Defendant had molested his sister when she was a child, and she suspected he might have molested the victim as well. Defendant's sister asked all of the children if anyone had ever touched them inappropriately. The victim told her aunt that defendant had been molesting her since 2003, when she was eight years old and they were living at the Sacramento Apartments.[1] Defendant's sister decided not to call the police at that time because defendant was incarcerated and she felt the victim was safe.

Some months later, during a game of "truth or dare," the victim revealed that she was still being molested by defendant. Defendant's sister told the victim's mother, who contacted the police.

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[1] The victim's mother testified that the victim was 10 years old when they lived at the Sacramento Apartments.

On January 3, 2009, Sacramento Police Department Officer Colleen Barker interviewed the victim, who said defendant had been molesting her "too many times to count" since she was approximately 10 years old, touching her breasts, vagina, and buttocks, over and under her clothing, and having vaginal intercourse with her. She said defendant did not wear a condom and ejaculated. He sodomized her and digitally penetrated her vagina, orally copulated her, and had her orally copulate him. He liked to smell and lick her feet and suck her toes, and smell her vagina and her "butt." He also told her he wanted to "taste her blood," which the victim took to mean defendant wanted to orally copulate her while she was menstruating. Defendant told her that God wanted him to do the things he did to her, and told her not to tell anybody. The victim said most of the acts occurred in the den at defendant's father's house (Grandpa B.'s house).

After the interview, Officer Barker had the victim make a pretextual telephone call to defendant. The call was recorded and ultimately played for the jury. During the call, the victim told defendant she was scared because her mother was "talking about calling the cops" and she did not know what to tell police. The conversation included the following colloquy:

"[Defendant]: [Don't t]ell them (unintelligible) a mother-fucking thing, you already know. Not a mother-fucking thing.

"[The Victim]: I already know what?

"[Defendant]: Don't say a motherfucking thing.

"[The Victim]: Uh-huh.

"[Defendant]: You already know. (Unintelligible). You understand me?

"[The Victim]: What is going to happen?

"[Defendant]: Nothing. You tell nothing. Nothing ever happened.

"[The Victim]: To you and me.

"[Defendant]: Nothing. No (unintelligible).

"[The Victim]: Uh-huh.

"[Defendant]: (Unintelligible) nigger. What the fuck . . . what you mean?

"[The Victim]: Dang, Dad. Why do you have to cuss?

"[Defendant]: 'Cause I -- I -- I don't -- I don't want to be disturbed by bullshit. Okay, you already know. You already fucking know . . . . You already know. You shouldn't ask me that. You already know too. You already know. Don't talk about shit. You already know.

"[The Victim]: Mom is going to tell them --

"[Defendant]: Tell them what?

"[The Victim]: That you touched me.

"[Defendant]: Oh she's lying. You going to say what she say. She's lying. She don't know nothing. What's she doing? This here is bullshit. (Unintelligible) her.

"[The Victim]: Are they going to make you stop touching me?

"[Defendant]: Who? Are they what?

"[The Victim]: Are they going to make you stop touching me?

"[Defendant]: Who?

"[The Victim]: The cops?

"[Defendant]: What about them?

"[The Victim]: Are they going to make me -- you stop touching me?

"[Defendant]: . . . are you trying to play me right now?

"[The Victim]: No.

"[Defendant]: (Unintelligible) right now, (unintelligible) right now.

"[The Victim]: I'm not.

"[Defendant]: What you're doing right now -- you're saying -- are you playing with me right now?

"[The Victim]: No.

"[Defendant]: Like I said I'm not in the mood to be playing with no bullshit. I'm not -- you know what I'm saying?

"[The Victim]: Sorry.

"[Defendant]: (Unintelligible due to both speaking at once). Say what?

"[The Victim]: Sorry.

"[Defendant]: (Unintelligible). You know what?

"[The Victim]: Well, I'm just scared.

"[Defendant]: About what? About what?

"[The Victim]: Mom is going to tell the cops.

"[Defendant]: What's she going to tell them? She don't know -- who she going to tell?

"[The Victim]: The cops.

"[Defendant]: Huh?

"[The Victim]: The cops.

"[Defendant]: I'm saying, what she going to tell them?

"[The Victim]: You touched me.

"[Defendant]: How she know that? You tell her that or something?

"[The Victim]: No. Auntie . . . did.

"[Defendant]: (Unintelligible due to both speaking at once). Who?

"[The Victim]: Auntie . . . did.

"[Defendant]: Man. She's a fucking liar. She's a liar and everybody -- just (unintelligible). She's a fucking liar and everybody know it. And don't be a liar like her. Don't do no bullshit. You understand me?

"[The Victim]: Yeah.

"[Defendant]: All right then, so why are you playing with me right now?

"[The Victim]: I'm not playing with you.

"[Defendant]: Yes you are. Well stop playing then. Stop playing with me now."

After further discussion, the conversation concluded with the following:

"[The Victim]: Love you. Bye.

"[Defendant]: (Unintelligible), [victim's name].

"[The Victim]: Huh?

"[Defendant]: Where's . . . at?

"[The Victim]: She's in the shower. Bye.

"[Defendant]: [Victim's name].

"[The Victim]: What? Bye, Dad.

"[Defendant]: [Victim's name].

"[The Victim]: What?

"[Defendant]: Can I trust you?

"[The Victim]: Yeah.

"[Defendant]: Okay. I love you.

"[The Victim]: Love you. Bye.

"[Defendant]: [Victim's name]. I trust you. You hear me?

"[The Victim]: Uh-huh.

"[Defendant]: Don't hurt me, okay?

"[The Victim]: Okay.

"[Defendant]: Don't hurt me. Do you hear me?

"[The Victim]: Uh-huh.

"[Defendant]: All right. I love you.

"[The Victim]: I love you too. Bye."

On January 14, 2009, during an interview by a forensic specialist, the victim recanted her story, claiming she fabricated the molestation allegations because she was mad at defendant for being incarcerated and not having been around much.

On January 29, 2009, the victim testified on behalf of defendant at a parole revocation hearing, during which she denied most of her prior statements to Officer Barker.

Detective Eugene Shim

Detective Eugene Shim spoke with defendant's sister, who suggested he speak with defendant's cousin. The cousin told Detective Shim she was molested by defendant as a child.

Detective Shim interviewed the victim at her school on May 13, 2009. When asked why she recanted during the interview with the forensic specialist, the victim said "she didn't want her dad [defendant] to go to jail." She told Detective Shim that defendant had been molesting her since she was 10, and started having vaginal intercourse with her in the den of her Grandpa B.'s house when she was 11. She said defendant touched her a lot, "both inside her private part and outside of her private part," and sometimes after having intercourse with her he removed his penis and ejaculated. The victim said defendant first smelled her butt when she was 12. Once, he asked her to put a vibrator in his anus. Defendant told her not to tell anyone. The victim told Detective Shim that she felt sad during the parole revocation hearing and did not want her dad to go to jail.

The Victim's Mother

The victim's mother testified she had had a relationship with defendant that produced three children, one being the victim. The victim was "13 going on 14" when she told her mother that defendant had been touching her and asked her mother "was she still a virgin." The mother immediately contacted police. She also testified that the victim was "going on 11 years old" when the family lived at the Sacramento Apartments.

The Victim

The victim was 15 years old at the time of trial. She testified that defendant began molesting her when she was 10. She described the first incident, which occurred at home when no

one else was present, when defendant digitally penetrated her vagina, then took his pants off and ejaculated. After that first incident, defendant touched her on more than one occasion while she was 10, sometimes digitally penetrating her, sometimes touching her vagina and buttocks while she had her clothes on, and other times rubbing her vagina over the top of her clothing. Defendant told her not to tell anyone.

When the victim was 11, defendant penetrated her vagina with his penis for the first time, putting "grease" on her beforehand. Defendant also had her rub his penis with her hand and orally copulate him. The victim testified that this occurred at the Sacramento Apartments when no one else was home. Defendant had vaginal intercourse with her more than three times when she was 11 years old.

The victim testified that when she was 12, she did not see defendant much because he was incarcerated.

When the victim was 13 and she and defendant were sitting next to each other on a couch at Grandpa B.'s house, defendant asked to smell her vagina and orally copulated her, then penetrated her vagina with his penis, after which he pulled his penis out and ejaculated on her thigh. The victim testified that defendant similarly molested her on at least five occasions at Grandpa B.'s house. She also testified that on one occasion, defendant asked her to put a white vibrator in his anus. Defendant smelled her feet "all the time" and sucked her toes once. On one occasion, defendant used Vaseline and attempted to

sodomize the victim, but she testified "that hurted" and she "didn't like it," so he stopped.

The victim testified that defendant gave her money and clothes, something she felt he did so he could "do these sex things" with her. Defendant told her God wanted him to do those things to her, but she did not believe him.

Either a few months before or just after the victim turned 14, she began to menstruate. She rejected defendant's advances by telling him she was "on [her] period." Defendant told her he "wanted to taste it," but she told him no. The victim testified that defendant did not molest her after that.

The victim testified she was 13 when she told her grandmother about the molestation. Long before that conversation and during a game of truth or dare ("way before" the vibrator incident but after the first time defendant put his penis in her vagina), she told her aunt, defendant's sister, about the molestation. She eventually told her mother. The victim testified that she did not initially want to tell the police because she "didn't want to get [defendant] in trouble." However, when her mother started crying she told an officer about the molestation. She told the truth but did not tell the officer everything. The victim said she lied during the interview with the forensic specialist because she wanted to protect her grandmother (defendant's mother), who was present during the interview, and defendant, who "they said . . . was listening." She testified she was able to speak the truth at trial because she felt better about herself.

Defendant

Defendant testified that he lived with the victim's mother and their children, including the victim, at the Sacramento Apartments; however, he only lived there for a 90-day period sometime before he was arrested in August 2005. He said that by the time he was paroled in May of 2006 they had already "lost the apartment at [the Sacramento Apartments]," so he paroled to Grandpa B.'s house. At that time, the victim was living with defendant's mother south of Sacramento. He testified that he saw his children in May 2006 before being arrested again "a couple months later" and going to prison "for another couple of months."

Defendant testified that, from the time the victim was two years old, he was in and out of prison for approximately 13 years. During periods when he did not live with the victim he tried to see her regularly, sometimes at his mother's house and sometimes at Grandpa B.'s house. Defendant denied the victim's claims of sexual misconduct, as well as his sister's accusations of molestation.

PROCEDURAL BACKGROUND

Defendant was charged by amended information with four counts of lewd and lascivious acts against a child under the age of 14 (Pen. Code, § 288, subd. (a) -- counts one, two, three, and five) and one count of continuous sexual abuse of a child (Pen. Code, § 288.5 -- count four). Count one alleged defendant put his hand on the victim's vagina. Count two alleged defendant placed his finger inside the victim's vagina. Count

three alleged defendant, for the first time, placed his penis inside the victim's vagina. Count five alleged defendant directed the victim to place a vibrator in defendant's anus. Counts one and two were alleged to have taken place "[o]n or about and between March 01, 2005, and February 28, 2006." Count three was alleged to have taken place "[o]n or about and between March 01, 2006, and May 05, 2006." Count four was alleged to have taken place "[o]n or about and between May 06, 2006, and February 28, 2007." Count five was alleged to have taken place "[o]n or about and between March 01, 2007, and December 31, 2008." The amended information also alleged that defendant served six prior prison terms. (Pen. Code, § 667.5, subd. (b).)

The jury found defendant guilty of all charges. In a bifurcated proceeding, the court found the prior prison allegations true.

The court sentenced defendant to 30 years in state prison, comprised of 16 years (the upper term) for count four, plus consecutive two-year terms (one-third the middle term) for each of the four lewd and lascivious act convictions, plus consecutive one-year terms for each of the six prior prison term allegations.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Lewd and Lascivious Acts Against a Child Under Age 14

Defendant contends there is insufficient evidence he committed lewd and lascivious acts on the victim (i.e., placed

his penis inside the victim's vagina as alleged in count three) between March 1, 2006, and May 5, 2006. We disagree.

When a defendant challenges the sufficiency of the evidence, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 (*Johnson*).) We conclude there is sufficient evidence to support the count three conviction in this case.

The victim was born in March 1995 and was therefore 11 years old from March 2006 through February 28, 2007. In 2009 she told Detective Shim that, "to the best of her memory," the first act of vaginal intercourse occurred "sort of in the middle of her 11th year" in the den at Grandpa B.'s house. She testified at trial that defendant penetrated her vagina with his penis for the first time at the Sacramento Apartments when she was 11, and had vaginal intercourse with her at least two more times before she turned 12.

Defendant testified he was arrested in August 2005 and then released on parole in May of 2006. He contends the prosecutor failed to present evidence "pinning down the day in May [2006]" that he was paroled. As such, he urges, there was no evidence the alleged act of sexual intercourse "occurred on or after March 1, 2006 and prior to May 6, 2006, the start of the period

for the continuous sexual abuse of a child offense charged in count four." We are not persuaded.

Defendant admitted that when he was paroled and returned home to Grandpa B.'s house, he saw his children "in May of '06." It is certainly possible the first act of vaginal intercourse occurred sometime during one of those visits in May 2006. Moreover, even assuming defendant was paroled after May 5, 2006, the charging document alleged that the act occurred "[o]n or about and between" March 1, 2006, and May 5, 2006, and the charging document could have been amended to conform to the evidence adduced by both the victim's and defendant's testimony. (Pen. Code, § 1009; *People v. Pitts* (1990) 223 Cal.App.3d 606, 904-905 (*Pitts*).) "Time is only an essential allegation if the defense is one of alibi; otherwise, the prosecution need only prove the act alleged was committed before the filing of the information and within the statute of limitations. [Citations.]" (*People v. Moore* (1989) 211 Cal.App.3d 1400, 1414-1415.) Where, as here, the defense is neither based on alibi nor misidentification but rather denial, exact dates are not material so long as the charging document assures the alleged acts were committed within the applicable limitation period. (*People v. Jones* (1990) 51 Cal.3d 294, 315-316; see also *People v. Coulter* (1989) 209 Cal.App.3d 506, 513-514.)

Finally, despite discrepancies in her testimony, the jury determined the victim was credible when it found defendant guilty of sexually molesting her. The jury may well have thought that any discrepancies in the victim's testimony

regarding the exact dates and locations of the various sexual acts were the result of her age (she was 10 when the abuse started) and the fact that the abuser is someone she loves and wants to protect, as well as the fact that the sexual acts were so numerous that she had difficulty distinguishing by date, time, place, and detail one specific act from another. If the jury believed the victim's testimony, which it must have, the evidence was sufficient to convict defendant of committing lewd and lascivious acts against her.

II

Ineffective Assistance of Counsel

Defendant claims he was denied his right to effective assistance of counsel as to count three (lewd and lascivious act on the victim) because his trial attorney failed to introduce readily available evidence that he was in custody when the offense was alleged to have been committed.

To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) To establish deficient performance, defendant must show that counsel "failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "In order to render reasonably competent assistance, a criminal defense attorney should . . . explore the factual bases for defenses that may be

available to the defendant, and otherwise pursue diligently those leads indicating the existence of evidence favorable to the defense. [Citations.]" (*In re Neely* (1993) 6 Cal.4th 901, 919.)

A criminal conviction will be reversed for ineffective assistance "'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Where the record "'"sheds no light"'" on the reason for counsel's omission, we affirm "'"unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation[.]"'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Defendant claims his trial counsel failed to obtain and present as evidence prison records showing he was in custody during the period the lewd and lascivious conduct on the victim was alleged to have occurred (on or about and between March 1, 2006, and May 5, 2006), and that had these records been presented to the jury there was a reasonable probability he would have been found not guilty on count three.

The prison records at issue were presented by the prosecutor in the bifurcated court trial on the alleged prior convictions. Those records appear to show that defendant was arrested in August 2005 and his prior release on parole was revoked the following month, and that he was released again on parole on May 14, 2006. The record gives no indication why defense counsel did not present that documentation. Even

assuming counsel's performance fell below the requisite standard, it was not prejudicial. As the People correctly point out, the prison records do not undercut defendant's admission that he saw the victim in May 2006 after he was released on parole. The information could and most certainly would have been properly amended to conform to the evidence presented via those records. (Pen. Code, § 1009; *Pitts*, *supra*, 223 Cal.App.3d at pp. 904-905; see also *People v. Wilder* (1955) 135 Cal.App.2d 742, 749 [changing alleged date of charged offense does not change the offense charged for purposes of Penal Code section 1009].)

III

Continuous Sexual Abuse of Child

Next, defendant contends his conviction for continuous sexual abuse of a child (count four) must be reversed because there is insufficient evidence to prove that three or more months passed between the first and last acts of molestation. We disagree.

Penal Code section 288.5, former subdivision (a) provides, in relevant part: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in . . . three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child[.]"

"[T]he prosecution must prove defendant committed the minimum number of proscribed acts within the specified time period. 'Section 288.5 relates to "continuous sexual abuse" and accordingly requires at least three acts of sexual misconduct with the child victim over at least three months to qualify for prosecution of persons who are either residing with, or have "recurring access" to, the child.' [Citations.]" (*People v. Mejia* (2007) 155 Cal.App.4th 86, 94.) "[T]he prosecution need not prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and last sexual acts. Generic testimony is certainly capable of satisfying that requirement[.]" (*Id.* at p. 97.)

In assessing whether the record supports the implied finding of abuse over a three-month period, we apply the familiar rules regarding substantial evidence. "We review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859; see *People v. Barnes* (1986) 42 Cal.3d 284, 303-304; *Johnson*, *supra*, 26 Cal.3d at p. 576.) "'A reasonable inference . . . "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be

an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."' [Citation.] [¶] Evidence is sufficient to support a conviction only if . . . it '"reasonably inspires confidence"' [citation], and is 'credible and of solid value.' [Citations.]" (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

It is said that "[t]o warrant the rejection by a reviewing court of statements given by a witness who has been believed by the trial court or the jury, there must exist either a physical impossibility that they are true, or it must be such as to shock the moral sense of the court; it must be inherently improbable and such inherent improbability must plainly appear[.]" (*People v. Ozene* (1972) 27 Cal.App.3d 905, 910, disapproved on another point in *People v. Gainer* (1977) 19 Cal.3d 835, 844, 851-852; see *People v. Swanson* (1962) 204 Cal.App.2d 169, 172-173.) "Contradictions and inconsistencies alone will not necessarily constitute inherent improbability." (*Swanson*, *supra*, 204 Cal.App.2d at p. 172.) "The trial judge and not this court resolves the inconsistencies and contradictions." (*Id.* at p. 173.)

There is sufficient evidence to support defendant's conviction for continuous sexual abuse. Count four was alleged to have taken place "[o]n or about and between May 06, 2006, and February 28, 2007." The victim testified that the first act of sexual intercourse occurred when she was 11, and that defendant had vaginal intercourse with her more than three times when she was 11. Although her testimony is vague as to the exact number

of times defendant had vaginal intercourse with her when she was 11, she was clear that he did so at least four times. Having used the first instance of intercourse as the predicate offense for count three (as discussed in part I of this opinion), that act cannot be counted as one of the three lewd and lascivious acts required to prove count four. The remaining three incidents, either by themselves or together with other acts by defendant during the requisite time period, satisfy that requirement.

In addition to having sexual intercourse at least three times before she turned 12, the victim told Detective Shim that defendant touched her "a lot." She told Officer Barker defendant had been molesting her "too many times to count" since she was approximately 10 years old. At trial, the victim testified that in addition to the acts of vaginal intercourse, there were occasions during that same period of time when defendant either orally copulated her, had her orally copulate him, or had her masturbate him with her hand, or some combination of those acts.

Defendant argues the requisite acts could not have been committed during the requisite time period because he "was in prison during much of this period of time." As a preliminary matter, we note that the prison records were not before the jury at trial, and were only entered into evidence at the bifurcated court trial on the prior prison term allegations. In any event, according to defendant's testimony at trial, he was paroled to Grandpa B.'s house in May 2006, and he saw the victim during

that month. He was arrested "a couple months later" and spent "another couple of months" in prison. He did not recall whether he was released "sometime in late 2006," but recalled that he was arrested again on January 2, 2007, and was not paroled again until May of 2007.

The victim testified she regularly visited defendant at Grandpa B.'s house on weekends, a fact that was corroborated by defendant's own testimony that he tried to see her on a regular basis, visiting her "on the weekends" at Grandpa B.'s house.

Based on the testimony of both the victim and defendant, and in the absence of any testimony that defendant stopped sexually abusing the victim at any time during the relevant period, it is reasonable to infer that when defendant was not in custody he maintained the status quo and continued to regularly visit the victim on weekends. As such, defendant's intervening periods of incarceration do not call into question the sufficiency of the evidence to support count four.

A rational trier of fact could conclude defendant committed at least three acts of sexual misconduct over at least three months. Accordingly, substantial evidence supports the conviction for continuous sexual abuse.

IV

Imposition of Upper Term

Prior to imposing the upper term sentence, the court stated, in part, as follows: "Again, you have multiple victims. Right. You have a lengthy state prison record. You have multiple returns to parole. He doesn't do well on parole. [¶]

I suspect -- I haven't actually analyzed his rap sheet to see -- he's gone to prison enough where I can't tell how he's done on probation, but I suppose that on more than one occasion he's probably been violated. [¶] The other factor is you have continuous sexual conduct that spanned a long period of time." Following discussion between the court and both defense counsel and the prosecutor, the court imposed the upper term sentence as to count four, finding as follows: "When considering the factors in aggravation, the lack of factors in . . . mitigation, this Court can only conclude that this is a case that warrants imposition of the upper term. [¶] And the Court finds that the upper term would be appropriate in light of the fact multiple victims were involved, this involved along [*sic*] course of conduct, also, the defendant . . . has been incarcerated on numerous occasions in the past, he has violated parole on several occasions."

Defendant contends imposition of the upper term on the continuous sexual abuse of a child conviction was error because three of the four factors on which the court relied were improper. He further contends his claim was not forfeited for failure to object at trial because he was not given a meaningful opportunity to do so or his counsel was ineffective in failing to object. As we shall explain, each of defendant's contentions must fail.

A trial court provides an adequate opportunity "if, *at any time* during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for [it], and

the court thereafter considers the objections of the parties before the actual sentencing." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) Here, the court first allowed the parties full opportunity to argue the issue. Then, after stating the factors it considered relevant to support the upper term, the court invited further argument from counsel before finally imposing sentence. Defendant had ample opportunity to object at any time during the proceedings. He did not, and thus forfeited the claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354, 356.)

Defendant's claim is not rescued by virtue of his trial counsel's ineffectiveness for failure to object, as there was no prejudice. One of the factors relied upon by the court was defendant's poor performance on parole. A single factor in aggravation will support imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Under these circumstances, the court did not err in imposing an upper term sentence.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BUTZ, J.

MAURO, J.